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EXAMINER

WELLS, LAUREN Q

ART UNIT

PAPER NUMBER

1617

DATE MAILED: 05/15/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

10/023,330

Applicant(s)

ROLLAT ET AL.

Examiner

Lauren Q Wells

Art Unit

1617

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 20 February 2002.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-184 is/are pending in the application.
- 4a) Of the above claim(s) See Continuation Sheet is/are withdrawn from consideration.
- 5) ☒ Claim(s) 167,168,171,172,174,175,177,178,180 and 181 is/are allowed.
- 6) ☒ Claim(s) See Continuation Sheet is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

## Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 5-6.
- 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_.

Continuation of Disposition of Claims: Claims withdrawn from consideration are 10,11,15,24-27,35,42,43,47,56-59,71,80-83,96,97,101,109-119,132,133,137,146-158,167 and 168.

Continuation of Disposition of Claims: Claims rejected are 1-9,12-14,16-23,28-34,36-41,44-46,48-55,70,72-79,84-95,98-100,102-108,120-131,134-136,138-145,159-166,169,170,173,176,179 and 182-184.

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### **DETAILED ACTION**

Claims 1-184 are pending. Claims 10-11, 15, 24-27, 35, 42-43, 47, 56-59, 71, 80-83, 96-97, 101, 109-119, 132-133, 137, 146-158, 167-168 are withdrawn from consideration, as they are directed toward non-elected subject matter.

In the Communication filed 11/4/02, Paper No. 6, it is disclosed that there has been a difference of opinion between L'Oreal and the third party regarding inventorship for the claimed invention of this and related applications. The Examiner respectfully points out that assignment of inventorship is out of the Examiner's jurisdiction.

### ***Election/Restrictions***

Applicant's election with traverse of the Election/Restriction Requirement in Paper No. 7 is acknowledged. The traversal is on the ground(s) that the Examiner has not addressed that there is a serious burden in examining all of the claims at one. This argument is not found persuasive. As addressed in the previous Office Action, the restricted groups are distinct inventions as evidenced by their distinct classifications. Furthermore, in reference to Groups I and IV, the examiner respectfully points out that a method of making a composition and the composition itself, are distinct inventions and require distinct searches. As such, a search of all four inventions would place a serious burden on the Examiner. Regarding the election of species, the Examiner respectfully points out that the copolymers comprise up to three different combinations of monomers, which results in a great number of chemical possibilities. To search every possible species would place a serious burden on the Examiner.

The requirement is still deemed proper and is therefore made FINAL.

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The response filed 2/20/03, Paper No. 8, elected a copolymer of 2-ethyl hexyl acrylate/n-butyl acrylate/2-hydroxy ethyl methacrylate as the copolymer. The Examiner broadened the search to include polymers of butyl acrylate and hydroxyethyl methyl acrylate. The Election of Species requirement for the surfactant, conditioning agent is hereby withdrawn.

As pointed out below under "112 Rejections", Applicant independent claims are directed to "butyl (meth)acrylate monomers" and "2-ethyl hexyl (meth)acrylate monomers". Dependent claims from these independent claims recite "n-butyl acrylate monomers" and "2-ethyl hexyl acrylate monomers", respectively. While (meth)acrylate monomers and acrylate monomers are distinct chemical entities, the Examiner has searched these claims, wherein the "butyl (meth)acrylate monomers" are butyl acrylate and the "2-ethyl hexyl (meth)acrylate monomers" are 2-ethyl hexyl acrylate.

### ***Double Patenting***

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-9, 12-14, 16-23, 28-41, 44-46, 48-55, 60-70, 72 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over

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claims 1-9, 12-14, 16-23, 28-41, 44-46, 48-55, 60-70, and 72 of copending Application No. 10/022,253. Although the conflicting claims are not identical, they are not patentably distinct from each other because the only difference between the instant claims and '253 is that the instant claims proviso out certain (meth)acrylic copolymers. However, the instant claims and '253 both teach the same compositions comprising (meth)acrylic copolymers made up of the same monomers.

Claims 1-2, 4, 6, 13-14, 17, 20-22, 28, 29, 31-33, 34, 36, 38, 45-46, 48, 52-53, 60, 61-63, 64, 65, 67, 69-70, 72, 76-78, 84, 85, 80, 92-95, 99-100, 106-108, 120, 121, 126, 128 and 183-184 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-10, 13-17, 19-21 of copending Application No. 09/627,055. Although the conflicting claims are not identical, they are not patentably distinct from each other because the only difference between the instant claims and '055 is that the instant claims proviso out certain (meth)acrylic copolymers. However, the instant claims and '253 both teach the same compositions comprising (meth)acrylic copolymers made up of the same monomers.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

### ***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1, 4, 9, 21, 23, 28, 36, 41, 53, 60, 65, 67, 77, 79, 84, 90, 95, 107, 109, 126, 131, 143, 145, 159, 163, 166, 170, 173, 176, 179, 183, 134 are rejected under 35 U.S.C. 112, second

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paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

(i) The phrase “rinse composition” in claims 1, 23, 28, 60, 79, 84, 109, 145, 159, 163, 166, 170, 173, 176, 179, 183, 184, is vague and indefinite, as it is confusing. What is a rinse composition? What is the difference between a rinse composition and a non-rinse composition? Are not all cosmetic compositions ultimately rinsed from the skin?

(ii) The phrase “fatty substances” in claims 21, 53, 77, 107, 143, (lines 2) is vague and indefinite, as it is confusing. What are fatty substances? Are they anything with a lipophilic ingredient? The specification does not define this phrase and one of ordinary skill in the art would not be apprised of its meaning.

(iii) The phrase “active haircare agents” in claims 21, 53, 77, 107, 143, (lines 3-4) is vague and indefinite, as it is confusing. What is the difference between active and inactive haircare agents? The specification does not define this phrase and one of ordinary skill in the art would not be apprised of its meaning.

### ***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

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Claims 1-6, 12, 18, 22, 23, 28-30, 34-38, 44, 54, 55, 60-62, 64-66, 68, 78, 84-85, 88-92, 98, 159, 162, 169 are rejected under 35 U.S.C. 102(a)&(e) as being anticipated by Chang et al. (6,214,328).

Chang et al. teach stiff-feel hair styling compositions containing 2-67% of a C2-C5 alkyl acrylate, 5-71% of a methyl methacrylate, 0-70% of a hydroxyalkyl (meth)acrylate and 0-50% of a monocarboxylic acid monomer and 1-25% of a dicarboxylic acid monomer. The polymers are useful in aqueous hair styling compositions. Butyl acrylate is taught as a C2-C5 alkyl acrylate and hydroxyethyl (meth)acrylate is taught as the hydroxyalkyl (meth)acrylate. Anionic, cationic, nonionic, and amphoteric surfactants, and conditioning agents are taught as additives. Exemplified is an emulsion composition comprising 47% methylmethacrylate/ 25% butyl acrylate/ 10% hydroxyethylmethyl acrylate/ 13% methacrylic acid/ 5% itaconic acid and sodium lauryl sulfate (surfactant). See Col. 9, line 65-Col.12, line 6.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 17, 19, 21, 49, 50-51, 53, 73-75, 77, 103-105, 107-108, 120-121, 124-128, 134, 139, 140-141, 143, 144 145, 163 are rejected under 35 U.S.C. 103(a) as being unpatentable over Chang et al. as applied to claims 1-6, 12, 18, 22, 23, 28-30, 34-38, 44, 54, 55, 60-62, 64-66, 68, 78, 84-85, 88-92, 98, 159, 162, 169 above.



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Chang et al. teach stiff-feel hair styling compositions comprising 1-15% of an acrylic hair fixative resin containing 2-67% of a C2-C5 alkyl acrylate, 5-71% of a methyl methacrylate, 0-70% of a hydroxyalkyl (meth)acrylate and 0-50% of a monocarboxylic acid monomer and 1-25% of a dicarboxylic acid monomer. The polymers are useful in aqueous hair styling compositions. Butyl acrylate is taught as a C2-C5 alkyl acrylate and hydroxyethyl (meth)acrylate is taught as the hydroxyalkyl (meth)acrylate. Anionic, cationic, nonionic, and amphoteric surfactants, conditioning agents, plasticizers, solvents, propellants, preservatives, thickeners, moisturizers such as hydrolyzed silk protein and hydrolyzed wheat protein (polymer additives) and others are taught as additives. Exemplified is an emulsion composition comprising 47% methylmethacrylate/ 25% butyl acrylate/ 10% hydroxyethylmethyl acrylate/ 13% methacrylic acid/ 5% itaconic acid and sodium lauryl sulfate (surfactant). The reference lacks an exemplification of the percent weight of the copolymer, polymer additives, and conditioners. See abstract; Col. 2, line 54-Col. 7, line 50.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to exemplify the composition of Change et al. as comprising 1-15% of an acrylic hair resin because of the expectation of achieving a resin with the most effective hold properties that does not adversely affect the user's hair.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to exemplify the composition of Change et al. as comprising conditioners and moisturizer polymer additives because of the expectation of achieving a product that holds and protects the hair via moisturization.

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Claims 20, 52, 76, 142 and 106 are rejected under 35 U.S.C. 103(a) as being unpatentable over Chang et al. as applied to claims 1-6, 12, 17-19, 21-23, 28-30, 34-38, 44, 49-51, 53, 54, 55, 60-62, 64-66, 68, 73-75, 77-78, 84-85, 88-92, 98, 107-108, 120-121, 124-128, 134, 139, 140-141, 143, 144, 145, 159, 162-163, 169 above, and further in view of Torgerson et al. (5,730,966).

Chang et al. is applied as discussed above. The reference does not teach preferred glass transition temperatures.

Torgerson et al. teaches thermoplastic elastomeric copolymers. To achieve copolymers that soften upon heating and reharden upon cooling, the reference teaches that the glass transition temperature of the copolymer can be varied. See Col. 4, line 64-Col. 5, line 28.

Thus, one of skill in the art would be motivated to teach the copolymers of Chang et al. as having the instantly claimed glass transition temperature because of the expectation of achieving a hair styling, wherein the copolymer optimally softens upon heating and rehardens upon cooling. Furthermore, it has been held that where the general conditions of a claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. In re Aller, 105 USPQ 233.

Claims 13-14, 45-46, 69-70, and 99-100, 135-136 are rejected under 35 U.S.C. 103(a) as being unpatentable over Chang et al. as applied to claims 1-6, 12, 17-19, 21-23, 28-30, 34-38, 44, 49-51, 53, 54, 55, 60-62, 64-66, 68, 73-75, 77-78, 84-85, 88-92, 98, 107-108, 120-121, 124-128, 134, 139, 140-141, 143, 144, 145, 159, 162-163, 169 above, and further in view of Yang et al. (6,013,722).

Chang et al. is applied as discussed above. The reference does not teach cross-linking agents.

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Yang et al. teach acrylate resins polymers. Cross-linking agents, such as divinylbenzene are taught as controlling the physical and optical properties of the final polymer, and decreasing the haziness of compositions comprising such polymers. See abstract; Col. 3, lines 46-65.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to add the divinylbenzene, taught by Yang et al., into the composition of Chang et al. because of the expectation of achieving a composition that is not hazy and is aesthetically pleasing to the consumer.

Claims 16, 48, 72, 86, 87, 102, 122, 123, 138, 160-161, 164, 165, and 167 are rejected under 35 U.S.C. 103(a) as being unpatentable over Chang et al. as applied to claims 1-6, 12, 17-19, 21-23, 28-30, 34-38, 44, 49-51, 53, 54, 55, 60-62, 64-66, 68, 73-75, 77-78, 84-85, 88-92, 98, 107-108, 120-121, 124-128, 134, 139, 140-141, 143, 144, 145, 159, 162-163, 169 above, and further in view of Bhatt et al. (2002/0004035).

Chang et al. is applied as discussed above. The reference does not teach shampoos, conditioners, or pH ranges.

Bhatt et al. teach that hair styling compositions are available in diversified forms, such as shampoos and conditioners. A pH range of 6-10 is taught for hair styling compositions. See [0018] and [0010].

It would have been obvious to one of ordinary skill in the art at the time the invention was made to teach the compositions of Chang et al. in the forms of shampoos or conditioners, as taught by Bhatt et al., because of the expectation of achieving a product that can be used in diversified forms.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to teach the composition of Chang et al. as having a pH between 6-10, as taught by Bhatt et al., because of the expectation of achieving a gel that does not adversely affect the hair by being too acidic or basic. Furthermore, it has been held that where the general conditions of a claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. In re Aller, 105 USPQ 233.

Claims 1-2, 4-9, 12-14, 16, 17-22, 23, 28-41, 44-46, 48-51, 53-55, 60-70, 72-73-75, 77-79, 84-85, 88-95, 98-100, 102-103-105, 107-109, 159, 162, 166, 169, 179, 182, 183, 184 are rejected under 35 U.S.C. 103(a) as being unpatentable over Yang et al. (6,013,722).

Yang et al. teach a pressure sensitive adhesive emulsion comprising 50-90% n-butyl acrylate, 10-50% 2-hydroxy ethyl methacrylate, and 2-ethyl hexyl acrylate, and optionally a cross-linking agent. Divinylbenzene is taught as the cross-linking agent. Surfactants, plasticizers, dyes, fillers, antioxidants, and UV stabilizers are taught as additional ingredients. The adhesive has a pH between 1 and 7. The reference lacks preferred percent weights of monomers and surfactants. See abstract, Col. 2, lines 20-33; Col. 3, line 25-Col. 5, line 55; Col. 13, line 60-Col. 16, line 16.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the percent weight of the monomers of Yang et al. to reflect the percent weights recited in the instant invention because it has been held that where the general conditions of a claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. In re Aller, 105 USPQ 233.

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Claims 120-121, 124-131, 134, 135-136, 138-141, 143, 144-145, 163, 170, 173 and 176 are rejected under 35 U.S.C. 103(a) as being unpatentable over Yang et al. in view of Engel et al. (2002/0058754).

Yang et al. teach a pressure sensitive adhesive comprising 50-90% n-butyl acrylate, 10-50% 2-hydroxy ethyl methacrylate, and 0-30% 2-ethyl hexyl acrylate, and optionally a cross-linking agent. Divinylbenzene is taught as the cross-linking agent. Surfactants, plasticizers, dyes, fillers, antioxidants, and UV stabilizers are taught as additional ingredients. The adhesive has a pH between 1 and 7. The reference lacks preferred percent weights of monomers and does not teach conditioners. See abstract, Col. 2, lines 20-33; Col. 3, line 25-Col. 5, line 55; Col. 13, line 60-Col. 16, line 16.

Engel et al. teach pressure sensitive adhesives. Skin moisturizers are taught as additives. See abstract, [0050].

It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the percent weight of the monomers of Yang et al. to reflect the percent weights recited in the instant invention because it has been held that where the general conditions of a claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. In re Aller, 105 USPQ 233.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to add skin moisturizers (conditioners), as taught by Engel et al., to the pressure sensitive adhesive of Yang et al. because of the expectation of achieving a pressure sensitive adhesive that protects the skin from drying once applied.

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Regarding the phrase “wherein said composition provides a reshapable effect and is a rinse composition” at the end of each independent claim, the Examiner respectfully points out that the claims are directed to a composition. Any properties exhibited by or benefits provided the composition are inherent and are not given patentable weight over the prior art. A chemical composition and its properties are inseparable. Therefore, if the prior art teaches the identical chemical structure, the properties Applicant discloses and/or claims are necessarily present. In *re Spada*, 911 F.2d 705, 709, 15 USPQ 1655, 1658 (Fed. Cir. 1990). See MPEP 2112.01. The burden is shifted to Applicant to show that the prior art product does not inherently possess the same properties as instantly claimed product. The prior art teaches compositions containing the same components as instantly claimed, which would inherently treat provide a reshapable effect as instantly claimed. Applicant has not provided any evidence of record to show that the prior art compositions do not exhibit the same properties as instantly claimed. Regarding the phrase “rinse composition”, the Examiner respectfully points out that any composition can be rinsed and as stated above, this phrase is vague and indefinite.

***Allowable Subject Matter***

The following is a statement of reasons for the indication of allowable subject matter:

Claims 167-168, 171-172, 174-175, 177-178, 180-181 would be allowable if they are written in independent form comprising a (meth)acrylic copolymer of n-butyl acrylate, 2-hydroxy ethyl (meth)acrylate, and 2-ethyl hexyl acrylate.

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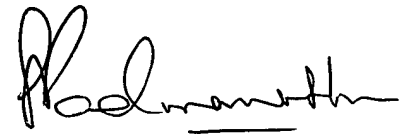
***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Lauren Q Wells whose telephone number is (703) 305-1878. The examiner can normally be reached on M-F (7-5:30), with alternate Mondays off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Sreeni Padmanabhan can be reached on (703)305-1877. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 872-9306 for regular communications and (703) 872-9307 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-1234.

lqw  
May 5, 2003



SREENI PADMANABHAN  
PRIMARY EXAMINER

5/5/03